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John Spotswood of Spotswood, Esq; - - - Appellant.

James Burnet of Craigend, Esq; - - - Respondent. 576 m 19 80

The Respondent's CASE. 47

Act of Annexation,
29th Act, Parl. 29.
Ja. VI. in 1587.

SOON after the Reformation, an Act passed in Scotland in 1587, whereby all Abbey Lands, &c. were annexed unalienably to the Crown, and declaring, that the *Feuars* (or Tenants) should hold their Lands of the Crown, and become immediate Vassals to his Majesty, and his Successors, paying the *Feu-duties*, (Fee Farm-rents) and Services, contained in their Infeftments.

10th Feb. 1624.

Notwithstanding this general Annexation, K. Ja. VI. in 1624, granted a Charter of the Lands formerly belonging to *New-Abbey*, lying in the County of Galloway, to Sir Robert Spotswood, then President of the Court of Session, the Appellant's Great Grandfather, erecting those Lands into a Barony; and declaring, "That all the Vassals, and heritable Tenants, of the said Lands and Barony, should hold their Lands immediately of the said Sir Robert Spotswood, and his Heirs, as their Superiors, as they formerly held the same of the Abbots of the said Abbey, before the Act of 1587; His Majesty promising, that these Lands should be dissolved from the said Annexation, by an Act to be passed in the next Parliament."

In the Parliament 1633, a private Act passed, dissolving from all Acts of Annexation, the *Superiority* of the Kirk Lands of *Dunrod*, and also the Abbacy of *New-Abbey*, with the hails Lands, *Baronies*, &c. thereto pertaining, "and annexing the same to the Crown, to the Effect his Majesty may dispose thereupon at his Pleasure."

9th Act, Parl. 1.
Ch. I. § 3. 1633.

By the 9th Act of the same Parliament, his Majesty revokes, and declares void, all Grants made by himself, or his Predecessors, of any Church Lands annexed to the Crown by the former Acts of Annexation, "where lawful Dissolution of the said Annexation was not made by his Majesty his said deceased Father, and his said Predecessors, Kings of Scotland, in their Majority, with Consent of the three Estates of Parliament."

10th Act, Parl. 1.
Ch. I. 1633.

By the 10th Act in the same Year, all former Acts of Annexation are ratified, and the *Superiority* of all Church Lands is expressly declared to belong to the Crown. "And his Majesty and Estates declare, all Rights and Deeds whatsoever, made and granted to whatsoever Person or Persons, preceeding the Date hereof, which prejudice his Majesty, and his Successors, in the peaceable bruiking, enjoying and possessing of the said Superiorities, to be null and void."

14th Act, Parl. 1.
Ch. I.

By the 14th Act in the same Year, the *Superiorities* of all Church Lands annexed to the Crown, are declared, in the most express Terms, to belong to his Majesty, and his Royal Successors. "And all Rights and Deeds whatsoever, granted by him, or his deceased Father, or Grandmother Queen Mary, of the said Superiorities, are declared void."

Soon after the aforefaid Act, dissolving the Lands of *New-Abbey* from the annexed Property of the Crown, Sir Robert Spotswood did, in 1634, for the Sum of 3000 l. to be paid by King Charles I. resign (or surrender) these Lands into his Majesty's Hands, *ad perpetuam remanentiam*, being the usual and proper Method of vesting the Tenant's Estate in the Lord. And in that same Year, King Charles I. annexed them to the See of *Edinburgh*, then newly erected, as a Part of its Revenue.

Upon the Abolition of Episcopacy, in 1640, they reverted to the Crown. And it appears, by a Signature of K. Cha. I. in 1641, that he intended to re-grant these Lands of *New-Abbey* to Sir Robert Spotswood, on a Recital, that the agreed Price for which they had been surrendered by him to his Majesty, in 1634, had not been paid. But as nothing followed on this Signature, the Grant was ineffectual.

Another Signature, to the same Purpose, was obtained in 1660, by Alexander Spotswood, Sir Robert's Son, which was also ineffectual, as no Charter ever passed upon it.

13th Act, Parl. 1.
Ch. II. in 1661.
This Act, towards the End, expressly excepts the former exceptions and reservations in the Acts 1633.

By an Act passed in 1661, the Act of Annexation of 1633, is ratified and confirmed, particularly as to what regards the *Superiorities* of Church Lands, and all Grants of such Superiorities are made void: But it is declared, "That notwithstanding this Act, any who have gotten, or shall get, any new Infeftment of Superiority of Kirk Lands, the same shall stand good as to such Vassals who have given their Consents to the said Superiority."

Act, 2 Sess. Parl. 1.
Ch. II. in 1662.

Episcopacy being restored in 1662, another Act passed, declaring, "the Bishops to be, as to their Patri-mony and Rents, in the same Case and Condition as they were in, in the Year 1637." Consequently, the Lands and Barony of *New-Abbey* reverted to the Bishops of *Edinburgh*, who held them until Episcopacy was again abolished at the Revolution; and during that Period, some of the Vassals of this Barony, who had it in their Option to hold their Lands of the Crown, or of the Lords of Erection, thought fit to accept of Charters from the Bishops of *Edinburgh*.

15th Act, Parl. 1.
William and Mary, in 1690.

Upon this last Abolition of Episcopacy, the Lands of *New-Abbey* again reverted to the Crown: And by an Act passed in 1690, "It is enacted and declared, that for removing all Doubts and Questions that may arise anent the

" the Superiorities of these Lands, &c. which formerly held of Prelates, or Bishops, &c. and to the Effect the
 " Subjects and Vassals of these Holdings may be put in Assurance hereafter, That all these Superiorities which
 " formerly pertained to the said Prelates, and Bishops, and their Chapters, or Deans, and others foresaid,
 " do now pertain and belong, and shall hereafter pertain immediately to their Majesties, and their Successors,
 " in all Time coming; and that the Vassals of these Lands, Milns, Fishings, heritable Offices, and others,
 " which formerly held immediately of the said Prelates, Bishops, and their Chapters, Deans, and others fore-
 " said, do now, and shall in all Time coming, hold the same immediately of their Majesties, and their Suc-
 " cessors, in the same Form and Manner of holding, as they formerly held of the said Prelates, Bishops, and
 " their Chapters, Deans, and others foresaid, conform to the said Vassals their Infeftments and Rights, made
 " and pertaining to them, which are hereby declared to be unprejudged by the abolishing of the said Prelates,
 " Bishops, and their Chapters, and others their former Superiors. And it is hereby declared, that it shall not be
 " leifome to interpose any other Superior betwixt their Majesties and any of these Vassals, (who are hereby ordained to
 " hold immediately of their Majesties, in Manner foresaid.) And if any Person do in the contrary, all such Deeds
 " are hereby declared to be void and null, even altho' the Vassal should consent thereto." And by the 11th Act,
 Parl. 1706, the Feu duties of all annexed Church Lands are vested irredeemably in the Lords of Erection;
 but the Superiority is to remain in the Crown.

16th July, 1695. In 1695, John Spotswood, the Appellant's Father, petitioned the Parliament of Scotland, setting forth the
 above-recited Transaction with King Charles I. in 1634, and Signatures in 1641 and 1660, praying a new Signa-
 ture of Restitution, and to be put into the immediate Possession of the Lands and Barony of *New-Abbey*; —
 which was referred to a Committee; who, after examining the Allegations of the Petition, made their Report :
 Whereupon it was declared, " That the Clause in the Act of Parliament 1662, restoring Bishops to their
 " Estates and Possessions by them enjoyed in the Year 1637, cannot prejudice the Petitioner; and that the
 " Price never being as yet paid, the said Lands and Barony of *New-Abbey*, and others, do appertain and be-
 " long to the said John Spotswood, or at least the foresaid Price thereof, with Annualrent thereof, ever
 " since Sir Robert ceded and gave up his Possession : And therefore they recommended, and do hereby in all
 " Humility recommend to his Majesty, and to the Commissioners of Treasury and Exchequer, that a new
 " Signature be passed in Favour of the said John Spotswood Petitioner, conform to the Signature formerly
 " granted to his Grandfather in the Year 1641, and also to order him to be put in Possession until the foresaid
 " Price be paid."

1738. Nothing however was done upon this Parliamentary Declaration and Recommendation for Forty-three
 Years; at the end of which the Respondent having served himself Heir to his Father, brought an Action in
 the Court of Session, against the Officers of State, on his Majesty's Behalf, for establishing his Right to the
 said Lands of *New-Abbey*: And after hearing Parties, the Court, by Interlocutor of 28th June, 1740,
 found, " That altho' it appears to them that the Pursuer is justly intitled to a Charter from the Crown, of
 " the Lands of *New-Abbey* in question, or Payment of the Price thereof, in virtue of the Act and Recom-
 " mendation of the Parliament of Scotland in the Year 1695, in Favour of Mr. John Spotswood his Father
 " deceased; that they have no Jurisdiction to grant any Execution upon that Act for obtaining of such Char-
 " ter, or recovering of the Price; leaving the Pursuer to make his humble Applications to the Crown, for a
 " proper Charter, in the Terms of the said Act of Parliament, as he shall be advised."

15th Feb. 1742. The Appellant soon after obtained a Charter under the Great Seal from his late Majesty, reciting the said
 Declaration of Parliament 1695, and Recommendation of the Court of Session 1740, and granting to the
 Appellant, " Totas & integras terras & baroniam de New Abbey inibi comprehendand. terras baronias decimas
 " aliaque subscript. olim pertinen. beneficio & abbatiae de New Abbey, &c. — And upon this Charter
 the Appellant was infeoffed in these Lands.

This Charter contains several other Lands besides those resigned by Sir Robert Spotswood in 1634, to King
 Charles I. which never belonged to the Appellant's Ancestors, namely, Part of the Property Lands of *New-Abbey*,
 which belonged to Sir John Hay, and the Superiority of the Lands of *Dunrod*, which belonged to the
 Lord *Holyroodhouse*.

Soon after this Charter passed, the Respondent, (whose Estate is of about 20 l. of yearly Rent) and several
 others, Owners of Lands formerly held of *New-Abbey*, being undoubtedly entituled under the above Acts,
 to hold of the Crown in chief, applied for and obtained Charters from his Majesty as their immediate lawful
 Superior, paying certain Feu-duties formerly payable to the Abbacy, and now payable to the Appellant in Vir-
 tue of his said Charter.

The present Action. The Appellant after an ineffectual Opposition in the Court of Exchequer to the Respondent's obtaining
 a Charter from the Crown, brought an Action in the Court of Session for declaring his Right to the Superi-
 ority of the Respondent's Lands, and consequently vacating his Charter.

The Cause coming on before the Lord *Alemoore* Ordinary, the Respondent insisted upon his Right of hold-
 ing his Lands of the Crown, in the same Manner as all the Vassals of annexed Church Lands have been
 indisputably intitled to hold, since the several Acts of Annexation.

The Appellant endeavoured to distinguish the Lands of *New-Abbey* from the other Church Lands, insisting
 particularly on the Plea of Favour, arising from the intended Grants of Restitution, by the Signatures 1641
 and 1660, and the Recommendation of the Parliament and Court of Session before mentioned, whence it
 appeared he had Right to be restored to his Ancestor's Estate, in the same Condition it was possessed by Sir
 Robert Spotswood in 1633, and which had been accordingly restored to him by the King's Charter in 1742.

10th Dec. 1761, On this first State of the Case, the Lord Ordinary pronounced the following Interlocutor: " Finds, That as
 Interlocutor of the " the Charter from the Crown in Favour of the Pursuer Anno 1742, proceeds upon the Narrative of the
 Lord Ordinary. " Charter 1624, the Signature 1641, the Signature 1661, the Declaration of Parliament 1695, and the De-
 " cree of the Court of Session 1741, that Charter ought to receive the most liberal Construction in order to
 " restore

" restore the Pursuer to the full Right and Title of the Lands and Barony of *New-Abbey*, &c. as the same stood in the Person of Sir *Robert Spotswood*, the Pursuer's Great Grandfather, in the Year 1634, when he resigned the same into the Hands of the Crown, for a Price which was never paid. Finds, That by Virtue of the Charter 1624, and the Act of Dissolution 1633, Sir *Robert Spotswood* was, in the Year 1634, intitled to the Superiority of the Lands formerly held of the Abbacy of *New-Abbey*. Finds, That the Act 1690, declaring the Superiorities which pertained to Bishops to belong to the Crown, ought not to be extended to the Superiorities of *New-Abbey*, in respect, that by the Declaration of the Parliament 1695, it is declared, That the Act 1662, restoring Bishops to their Possessions as in the Year 1637, did not pre-judge the Pursuer's Father; and therefore finds, That the Pursuer is intitled to the Superiority of the Defender's Lands in Question, which had confessedly been held of the Abbacy of *New-Abbey*; and that these Lands are in Non-entry, and decerns and declares accordingly." To which Interlocutor the Lord Ordinary adhered, upon a Representation and Answer.

21st Feb. 1762.
2d Interlocutor of
the Lord Ordinary.

14th July, 1762.
1st Interlocutor of
the whole Lords ap-
pealed from.

8th Dec. 1762.
2d Interlocutor of
the whole Lords,
appealed from.

The Respondent petitioned the whole Court against these Interlocutors of the Lord Ordinary, and the Appellant having answered, the Court of this Date *unanimously* pronounced the following Interlocutor: " The Lords find *James Burnet* is entituled to hold his Lands of the Crown, and therefore affoilzie the said Defender, and decern;" and upon a reclaiming Petition, Answer and Reply, " Adhered to their former Interlocutor, and refused the Desire of the Petition."

The Appellant has thought proper to appeal to your Lordships from these two Interlocutors, but the Respondent humbly hopes, they will be affirmed, and the Appeal dismissed with Costs, for the following among other

R E A S O N S.

- I. All Church Lands were annexed to the Crown, except in a few Particulars, by Act 29, Parl. 1587, and by Acts 9, 10 and 14, Parl. 1633. They were again unalienably annexed to the Crown, (Superiority and Property,) and all Grants thereof preceding those Acts declared void and null. The Grant therefore of the Lands in Question made by King *James* to Sir *Robert Spotswood* in 1624, was void, as directly contrary to the Act 1587, whereof the King was so sensible, that he promises to get these Lands dissolved from the general Annexation, by Act of Parliament. An Act passed accordingly in 1633, which however disannexes only the Property of these Lands, leaving the Superiority still to remain in the Crown, as plainly appears from the Words. Wherever the Act meant to disannex the Superiority, as in the Case of *Dunrobd*, it does it by express Words: But as to *New-Abbey*, it speaks only of *Lands and Barony*, which manifestly denote a Difference of Intent, as otherwise the Words of this Act of Dissolution would have been as broad and comprehensive as those of the annexing Act 1587, or of the others which passed this same Parliament; and Act 1, Parl. 1662, restoring Bishops to their *Patrimony and Rents*, as they stood in 1637, could not restore to the See of *Edinburgh* a Superiority it never had, and which always continued in the Crown.

Obj. I. The Act of Dissolution is of the Lands and Barony of *New-Abbey*, and Barony being *nomen universitatis* includes Superiorities.

Ans. There is a manifest Distinction between a Barony and a Superiority, the first is a Name of Jurisdiction, and the last of Tenure, nor is there any Incompatibility between the Jurisdiction of the Baron over the Tenants of the Barony, with a Right to the Feu-duties, and the Tenure of these Vassals of the Crown in Chief, as appears from the above Act of 1706.

Obj. II. Many of the Vassals of this Barony acknowledged the Bishop of *Edinburgh* as their Superior, by taking Charters from him between the Restoration of Episcopacy in 1662, and the final Abolition of it at the Revolution.

Ans. It does not thence follow, that the Respondent is at this Day bound to acknowledge the Appellant, or any else but the King for his Superior. The Vassals taking Charters from the Bishops in those Times, proceeded from the Option given them by Act 53, Parl. 1661, of consenting to (*i. e.* recognizing) the Right set up under Grants, good or bad, of Superiorities of Church Lands to Subjects. This Option was given in Ease of the Vassal, but is now out of Doors by the perpetual Annexation of all Superiorities of Church Lands under Act 29, Parl. 1690, which annuls every such Consent of the Vassal.

- II. Admitting the Act of Dissolution to have disannexed the Superiority as well as Property of these Lands, and so to have substantiated Sir *Robert Spotswood*'s Grant of 1624, in its utmost Extent, his whole Right passed to King *Charles I.* by the Resignation *ad remanentiam* in 1634, and so the Estate, absolutely vested in the Crown, not to be divested on Account of the Non-payment of the Purchase-Money, which could only make Sir *Robert Spotswood* a Creditor, or give him as such, an equitable Lien upon the Lands to the Amount of the Purchase-Money. The Signatures of 1641 and 1660, plainly prove that the Crown could be divested of the Estate only by an Act of its own, and therefore intended that Act by an actual Restitution of the Estate, which, however, took no Effect. King *Charles I.*'s Annexation of these Lands to the See of *Edinburgh*, was either void by the annexing Acts of 1633, or good notwithstanding those Acts. If the first, the Superiority remained in the Crown; if the second, it was well conveyed to the See of *Edinburgh*, and was therefore, upon the final Abolition of Episcopacy, forever vested in the Crown by the Act 1690, which annexes the

Supa-

Superiorities appertaining to Bishops, Deans, and Chapters to the Crown, declaring, " That
 " it shall not be lawful to interpose any other Superior between their Majesties, and any of
 " these Vassals who are hereby ordained to hold immediately of their Majesties in Manner
 " foresaid. And if any Persons do in the contrary, all such Deeds are hereby declared to be
 " void and null, even albeit the Vassal should consent thereto."

III. The parliamentary Declaration of 1695, and Decree of the Court of Session, 28th June 1740, in the Appellant's Favour, cannot influence the present Question which relates to the *Superiority* or Mode of Tenure only, leaving the Appellant in full Possession of the Feu-duties and other Emoluments. The Parliament 1695 mention only the Act 1662, and seem not to have duly attended to that of 1690: But however, their Declaration extends only to the Appellant's Right to the *Lands and Barony*, without a Word of the *Superiority*, or to the Purchase-Money and Interest, and the Decree goes no farther. Neither of these Declarations could supersede the positive Annexation of the Superiority (then in the See of *Edinburgh*) to the Crown by the Act 1690, nor did intend it, all they meant being either to help the Appellant to his Purchase-Money, or to a Restitution of his *Land*, or the beneficial Emoluments, such as Feu-duties, &c. being the same as the Land, as was done by the Acts 1633, and afterwards by that of 1706, which leave all the beneficial Interests of the Superiority to the Lords of Erection, reserving only the Homage and Tenure to the Crown.

IV. The Appellant's Charter of 1742 proceeds upon the same Plan, granting only *terras & boroniam* without a Word of the Superiority, and however entitled to a liberal Construction, as in Restitution of an ancient Right, yet that goes only to what the Words clearly shew was meant to pass, but not to carry any thing by Implication which is foreign to the Words: This would be making the King's Grant, to inure to a double Intent, contrary to the Rules of Law.

Obj. III. In the Case of *Herriot's Hospital* against *Hepburn*, a similar Judgment to that complained of was given by the Court of Session, but reversed here, 2d June 1715.

Ans. The Cases are widely different. The Barony of *Broughton* was granted away by the Crown before the Act 1587, and expressly excepted out of that Act, as also out of one of those in 1633. It was therefore never annexed to the Crown at all, and being out of those Acts, was no Object of any of the subsequent ones.

AL. FORRESTER.
 HUGH DALRYMPLE.

John Spotwood of Spotwood, Esq; - Appellant.
 John Burnet of Craigend, - - Respondent.
 The Respondent's CASE.

To be heard at the Bar of the House of Lords, on Friday the
 18th Day of March, 1763.

